United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7299

To be argued by
BERNARD BURSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ISAAC JAROSLAWICZ and JOSEPH JAROSLAWICZ,

Plaintiffs-Appellants,

-against-

ALBERT A. SEEDMAN,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

---

APPELLEE'S BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	III
Issues Presented	3
Evidence	5
A. Events preceeding plaintiff's custody	5
B. Plaintiff in custody of the New York City Police Department	8
C. Plaintiff in the custody of Federal agents, and the subsequent Grand Jury indictment	13
D. Events subsequent to indictment	14
ARGUMENT - THROUGHOUT, THE DEFENDANT ACTED UPON REASONABLE GROUNDS, AND THEREFORE VIOLATED NO CONSTITUTIONAL RIGHT OF PLAINTIFF. SUMMARY JUDGMENT IS PROPER SINCE THERE IS NO EVIDENCE TO DISPUTE (1) THAT PRIOR TO PLAINTIFF BEING BROUGHT TO THE POLICE STATION FOR QUESTIONING AND TO BE VIEWED BY WITNESSES, HE HAD BEEN IDENTIFIED FROM A PHOTOGRAPH AS THE PURCHASER, UNDER A FALSE NAME, OF A RIFLE USED IN THE COMMISSION OF A FELONY THEN BEING INVESTIGATED; (2) THAT THE FORMAL ARREST WAS MADE BY FEDERAL OFFICERS, ON A FEDERAL CHARGE, AND THEREFORE NECESSARILY WAS NOT THE RESPONSIBILITY OF DEFENDANT (A CITY OFFICIAL); AND (3) IN ANY EVENT THAT ARREST WAS BASED ON AN EYEWITNESS IDENTIFICATION AND THEREFORE WAS MADE WITH PROBABLE CAUSE	16
A. Probable cuase is a complete defense to plaintiff's claim of a false arrest, and reasonable suspicion is a complete defense to the claim that plaintiff's rights were violated by custodial interrogation prior to the formal arrest	17

TABLE OF CONTENTS (continued)

Page

B. The Standard Applied on a Motion for Summary Judgment..... 25

C. A reasonable basis for custodial interrogation of the plaintiff is the undisputed fact that he had been identified from a photograph as the probable purchaser, under a false name, of the rifle used (shortly after the purchase) in the commission of a felony that police were investigating. Under all the circumstances, the duration of such custody was not unreasonable..... 28

D. The allegation that defendant, a City police official, "induced" federal officials to arrest plaintiff on a federal charge is legally insufficient where there is no claim that defendant made any untruthful statements to federal officials, and where the decision to arrest and prosecute was necessarily a decision of federal officials in the exercise of their exclusive jurisdiction..... 35

E. Assuming that defendant could be liable for the federal arrest if he "induced" such decision, that arrest is shown by undisputed evidence to have been made with "probable cause," and hence did violate plaintiff's constitutional rights..... 37

CONCLUSION..... 43

TABLES OF AUTHORITIES

Cases

	Pages
Adams v.Williams, 407 U.S. 143 (1972).....	18,37
Alco Kar Kurb Inc. v. Ager, 181 F. Supp. 97 (D.N.J., 1960)....	25
Anderson v. DeCristofalo, 494 F. 2d 321 (2d Cir., 1974).....	19
Ayers v. Pastime Amusement Co., 283 F. Supp. 773, (D.S.C.,1968)	27
Barnes v. Dorsey, 480 F. 2d 1057 (8th Cir., 1973), 354 F. Supp. 179 (E.D. Mo., 1971).....	38
Bartlett v. Wheeler, 360 F. Supp. 1051 (W.D. Va., 1973).....	38
Beal v. Lindsay, 468 F. 2d 287 (2d Cir., 1972).....	26
Beauregard v. Wingard, 362 F. 2d 901 (9th Cir., 1966).....	19
Bivens v. Six Unknown Named Agents, 456 F. 2d 1339 (2d Cir., 1972).....	19,23fn.
Boyd v. Adams, 513 F. 2d 83 (7th Cir., 1975).....	36fn.
Brinegar v. United States, 338 U.S. 160 (1949).....	18,37,38
Case, Matter of, 214 N.Y. 199 (1915).....	27
Donnelly v. Grion, 467 F. 2d 290 (2d Cir., 1972).....	26
Draper v. United States, 358 U.S. 307 (1958).....	17-18
DuVall v. Moore, 276 F. Supp. 674 (N.D. Iowa, 1967).....	25
Empire Electronics v. United States 311 F. 2d 175 (2d Cir., 1962).....	25
Fanale v. Sheeky, 385 F. 2d 866 (2d Cir., 1967).....	36fn.
Foster v. California, 394 U.S. 440.....	31fn.
Gladstone v. Galton, 145 F. 2d 742 (9th Cir., 1944).....	20
Griffin v. Breckenridge, 403 U.S. 88 (1971).....	24fn.
Hill v.Rowland, 474 F. 2d 1374 (4th Cir., 1973).....	19
Holland v. Lutz, 194 Kan. 712, 402 P. 2d 1015 (Sup. Ct., Kansas (1965).....	20

Cases

	Pages
Huey v. Barloga, 277 F. Supp. 864 (N.D., Ill., 1967).....	24
Jacques v. Sears, Roebuck & Co., 30 NY 2d 466 (1972).....	21
Johnston v. National Broadcasting Co. Inc., 356 F. Supp. 904 (E.D.N.Y. 1973).....	24
Kerr v. U.S. Dist. Ct. for N.D. Cal. 511 F. 2d 192 (9th Cir., 1975).....	18fn.
Kiess v. Eason, 442 F. 2d 712 (7th Cir., 1971).....	25
Kinzler v. N.Y. Stock Exchange, 62 F.R.D. 196 (S.D.N.Y., 1974).....	20fn.
Kirby v. Illinois, 406 U.S. 682 (1972)	31fn.
Langley v. City of New York, 40 AD 2d 844 (2d Dept., 1972).....	38
Marks v. Townsend, 97 N.Y. 590 (1885).	20
McComb v. Sorthein Weighing & Insp. Bureau, 170 F. 2d 526 (4th Cir., 1948).....	25
Morales v. New York, 396 U.S. 102 (1969).....	21
People v. Anderson, 46 AD 2d 150 (4th Dept., 1974).....	21-22
People v. Kinne, 40 AD 2d 938 (4th Dept., 1972).....	22
People v. Lombardi, 18 AD 2d 177, (2d Dept., 1963) affd 13 NY 2d 1014 (1963).....	18
People v. Morales, 22 NY 2d 55 (1968).	21,22,28
People v. Valerius, 36 AD 2d 671 (3d Dept., 1971).....	22
Pierson v. Ray, 386 U.S. 547 (1967)...	17,23fn.
Post v. Payton, 323 F. Supp. 799 (D.C.N.Y. 1971).....	24
Radio City Misic Hall v. United States, 135 F. 2d 715 (2d Cir., 1973).....	26
Rinieri v. Scanlon, 254 F. Supp. 409 (S.D.N.Y., 1966).....	26
Robinson v. Diamond Housing Corp., 463 F. 2d 853 (D.C. Cir., 1972).....	20fn.
Rodriquez v. Jones, 473 F. 2d 599 (5th Cir., 1973).....	19
Sams v. N.Y. St. Bd. of Parole, 352 F. Supp. 296 (S.D.N.Y. 1972).....	18fn.,27,38
Sartor v. Arkansas Gas Corp., 321 U.S. 620 (1944).....	26
Smith v. Swoope, 351 F. Supp. 259 (W.D. Va., 1972).....	19

Cases

	Pages
Stearns v. NYCTA, 24 Misc. 216 (S. Ct. N.Y. Co., 1960) affd 12 AD 29 451 (1st Dept.,1960).....	38
Stovall v. Denno, 388 U.S. 293 (1967).....	31
Street v. Surdyka, 492 F. 368 (4th Cir., 1974).....	19
Sykes v. State of Calif. (Dept. of Motor Vehicles), 497 F. 2d 197 (9th Cir., 1974).....	23
United States v. Bennett, 409 F. 2d 888 (2d Cir., 1969).....	31fn.
United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y., 1960).....	22,31,32
United States ex rel Cardaio v. Casscles, 446 F. 2d 632 (2d Cir., 1972).....	37
United States ex rel Catanzaro v. Mancusi, 404 F. 2d 296 (2d Cir., 1968).....	18,38
United States v. Chaplin, 427 F. 2d 14 (2d Cir., 1972).....	37
United States ex rel Corbo v. LaVallee, 270 F. 2d 513 (2d Cir., 1959).....	22
United States ex rel Gonzales v. Follette, 397 F. 2d 332 (2d Cir., 1968).....	17
United States v. Harrison, 460 F. 2d 270 (2d Cir., 1972).....	31fn.
United States v. Middleton, 344 F. 2d 78 (2d Cir., 1965).....	22,31
United States v. Simmons, 390 U.S. 377 (1968).....	31fn.
United States v. Tramontana, 460 F. 2d 464 (2d Cir., 1972).....	19
United States v. Ventresca, 380 U.S. 102 (1965).....	17,18
United States v. Vita, 294 F. 2d 524 (2d Cir., 1966).....	22-23,31,33
Wheeldin v. Wheeler, 373 U.S. 647 (1963).....	36fn.
Wong Sun v. United States, 371 U.S. 471 (1963).....	17

Statutes

	Pages
42 U.S.C. § 1983.....	1,17fn.,19
§ 1985.....	1,23,24
§ 1986.....	1,24
F.R.C.P. Rule 56.....	25

Textbooks

10 WRIGHT & MILLER, Federal Prac. & Proc. § 2713.....	25
§ 2721.....	27
35 C.J.S., False Imprisonment § 7.....	21

UNITED STATES COURT OF APPEALS
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ISAAC JAROSLAWICZ and JOSEPH JAROSLAWICZ,

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-against-

ALBERT A. SEEDMAN,

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On Appeal from the United States District Court for the Eastern District of New York

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APPELLEE'S BRIEF

In this civil rights action, commenced pursuant to 42 U.S.C. §§1983, 1985 and 1986, the plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York (BRUCHHAUSEN, J.), dated May 2, 2975, based on an order granting defendant summary judgment (73, 64-72)*.

It is alleged that plaintiff Isaac Jaroslawicz, then 18 years old, was taken into custody by detectives of the New York City Police Department, acting under

*Numbers in parentheses, unless otherwise indicated, refer to pages in the Joint Appendix.

orders of the defendant, then Chief of Detectives, and was in their custody at a police station (for 10 hours) until arrested there by U.S. Treasury agents on a federal charge. Plaintiff's claim is that in ordering such custody, and thereafter in allegedly "inducing" the arrest by federal agents, the defendant acted in bad faith and without reason to believe that Isaac Jaroslawicz had committed any crime (2-8). Joseph Jaroslawicz, the father of Isaac, seeks damages for his mental anguish over his son's arrest and for legal expenses. (Hereafter the term "plaintiff" will be used to refer to the son as though he were the only plaintiff).

For purposes of the motion for summary judgment, we accept, as did the District Court, the plaintiff's claim that his presence at the police station prior to the federal arrest was involuntary. The basis for summary judgment is that defendant acted reasonably in taking plaintiff into custody and, even if defendant bears legal responsiblity for the arrest by federal agents on a federal charge, the undisputed evidence shows that such arrest was made with probable cause, specifically, an eyewitness identification.

ISSUES PRESENTED

The plaintiff's detention can be divided into two periods: first the period prior to the formal arrest and charge (by federal agents) and, second, the period commencing with such formal arrest. With respect to the plaintiff's claim of unconstitutional detention prior to the formal arrest, the issue is:

> 1. Are police justified (i.e., acting within constitutional limits) in detaining a person in a police station for a reasonable time for questioning and a "lineup" (without a formal charge) after the detainee had been identified from photographs as the probable purchaser, under a false name, of the rifle used to commit a dangerous felony then being investigated -- and if such circumstances would justify a reasonable detention is there a "genuine" issue of fact raised as to whether such circumstances existed here and whether such detention was for more than a reasonable period under all the circumstances?

With respect to the claim based on the formal arrest, which concededly was made by federal agents on a federal charge, there are two issues, each representing an alternative basis for defeating the claim. One is:

> 2. Is there a genuine issue of fact here with respect to the claim that defendant (a City police officer) "induced" the plaintiff's arrest on a federal charge, as made by federal officials acting within their exclusive jurisidction?

Assuming that defendant could be responsible for the federal arrest, and legally liable if that arrest were made in violation of the constitution (i.e., without "probable

cause) then we reach the issue:

3. Is an arrest constitutionally permissible (made with "probable cause") where the arrestee had been identified by an eyewitness of good character, first from selection from an album of photographs and then from a "lineup", and such witness' testimony is sufficient by itself to be the basis for a grand jury indictment on the same charge -- and if such an arrest would be justified, is there a "genuine" issue of fact as to whether such eyewitness identification was made here?

EVIDENCE

A. Events preceeding plaintiff's custody

On October 20, 1971, four shots were fired through the window of a bedroom of the Soviet Mission to the United Nations where four children were sleeping at the time (49). Soviet officials lodged a complaint with the New York City Police Department, the act complained of being the felony of reckless endangerment (14).

Investigation revealed that the shots (fired through an 11th floor window) were fired from nearby 17-story Hunter College (49). Shortly after midnight (on October 21) police searching the Hunter College building found a brand new .243 caliber Remington rifle, with a telescopic sight, abandoned at the bottom of an airshaft (49). Ballistics tests established that the four shots fired into the Soviet mission came from that rifle.

Chief Seedman, after his retirement from City service, in collaboration with one Peter Hellman, wrote a book entitled "Chief," relating some of his experiences as Chief of Detectives, including the particular case which is the subject of this lawsuit. Pages from that book, from a chapter entitled "The Jewish Connection", are submitted by plaintiff as Exhibit A (47-61). In that book, Seedman recounts that it made sense for the sniper to have gotten

rid of the rifle as soon as possible, though police were gratified to find on the rifle an easily traceable manufacturer's serial number (50).

From that serial number, the police were able to trace the rifle from Remington, the manufacturer, to Charles Greenblatt, Inc., a dealer located in Hempstead, New York (50-51). Agents of the Alcohol, Tobacco and Firearms Division of the U.S. Treasury (hereafter "ATF Division") independently ascertained this fact (27).

Later that same morning (October 21), City detectives went to Charles Greenblatt, Inc. There, from the dealer's records, it was learned that the rifle had been sold ten days before (on Oct. 11) to a "Henry Faulkner" of 830 Arthur Ave, Bronx, New York. The purchaser signed "Henry Faulkner" on a purchase form, and displayed a Military Selective Service certificate (draft card) bearing that name and a number, both of which were recorded by the dealer (27).

Investigation revealed that this address was non-existent; and Selective Service Administration records indicated that the number on the draft card had <u>not</u> been assigned to any Henry Faulkner (15). The same facts were independently ascertained by the ATF Division (27). Using a false name in connection with the purchase of a rifle and possessing a falsfied Selective Service certificate were, undisputedly, both violations of federal statutes

(18 U.S.C. §§923, 924; 50 United States Code App. §§451-471).

Two persons at Charles Greenblatt, Inc. were involved in the transaction with "Henry Faulkner." They were Sol Jacobson, vice-president of the firm, who was the salesman, and Kenneth Aull, a gunsmith, who had spent about 10 minutes in the presence of the purchaser, adjusting the telescopic sight to the purchaser's satisfactions, and speaking with him.

Because the rifle had been discarded with the serial number intact, indicating the work of amateurs, and because of certain prior incidents, the police suspected that the crime was the work of members of a militant organization called the Jewish Defense League (hereafter "JDL"). (49, 51, 53-54, 61). The JDL had a history of activities against Soviet personnel in this City, including some explosions, in reprisal for that government's oppression of Jews in the Soviet Union; and many JDL members had arrest records. The police brought to Greenblatt's establishment the Explosive-Arson Squad's album of photographs of active JDL members (51), and asked Mr. Jacobson and Mr. Aull to to look through the album to see if they were able to recognize the purchaser of the rifle (16).

It is nowhere disputed that Jacobson and Aull picked out two photographs from the album, one of Isaac Jaroslawicz, another of one Lawrence Fine, as the purchaser of the rifle (16). Police went to Jaroslawicz's home on 44th Street in Brooklyn, but did not find him (51).

Suspecting that the persons responsible for the shooting might return to the scene of the crime, Chief Seedman directed that Jaroslawicz's name and photograph be furnished to police in the 19th precinct, where the shooting had taken place (51). That same day, in early evening, Isaac Jaroslawicz (who resided in Brooklyn) was observed by police sitting in an automobile, on 67th Street, a block or two from the Soviet Mission (38, 51).

Upon request of detectives, Jaroslawicz produced his driver's license and automobile registration, which documents identified him (38).

It is disputed that Jaroslawicz refused to accompany the police to the nearby 19th precinct police station (which was across the street) but, for purposes of this motion for summary judgment, we accept his allegation that he did not come or remain voluntarily.

B. Plaintiff in custody of the New York City Police Department

The plaintiff was taken to the 19th precinct sometime between 5:30 and 6:00 p.m., and Lawrence Fine arrived there shortly thereafter, in the company of an attorney. It is undisputed that plaintiff remained there

until about 4:00 a.m., at which time he was arrested and charged by U.S. Treasury Agents, and taken by them to the Federal House of Detention (16, 40-41).

Chief Seedman was at the station supervising City detectives during this period (45). The plaintiff, undisputedly, was represented and advised by an attorney, although there is some confusion how many different attorneys. Chief Seedman identified one attorney in his affidavit and in his book, one Bertram Zweibon (16, 53); and plaintiff's attorney quotes from Seedman's reference to Mr. Zweibon (34-35). Mr. Zweibon's card ("Kriger and Zweibon") is found stapled to the Federal complaint (25). Nowhere does plaintiff deny knowledge of Mr. Zweibon's presence or participation in the formation of a "lineup" (16). Plaintiff indicates only that he was represented by a Harvey Michelman, who arrived at the station "a few hours" later, after "somehow" learning that Jaroslawicz was in custody (39). Mr. Michelman, in an affidavit, states that he was contacted by a "member" of the JDL; and when he arrived at the police station he was immediately permitted inside to the plaintiff (44, 45). Plaintiff and Seedman agree that prior to the arrival of the attorney the plaintiff had declined to answer any questions (39,17). It is undisputed that, throughout, the plaintiff declined to give any alibi or any sample of his handwriting (17).

In his book, Chief Seedman indicates that since it was well after 6:00 p.m. when Jaroslawicz and Fine arrived at the 19th precinct, he would normally have waited till the next morning to have Jacobson and Aull (the persons from the gunshop) come in to look at the suspects; but he felt he was under pressure to get results and decided to have them come that same evening, though they were not enthusiastic about doing so (51).

A "lineup" was conducted that evening. According to Seedman's affidavit, this was between 7:20 p.m. and 8:10 p.m. (16). In his book, it is indicated that this occurred just after 9:00 p.m. (52). Plaintiff does not state when it occurred (40). He alleges, in general terms, that the lineup was unfair because "most of the other participants were much older" (40). But he does not deny Seedman's statement that the attorney, Mr. Zweibon, actively participated in the formation of the lineup, and that this lineup included, in addition to seven police officers, fellow JDL-member Lawrence Fine (16).

According to Seedman's affidavit, Jacobson selected one of the police officers as the purchaser (16). In his book, where there is more detail, Seedman notes that Jacobson, after that initial mistake, tentatively pointed out the plaintiff. But he had been so uncertain that he was considered to "be hopeless as a witness" (52). Seedman felt, from observing him, that perhaps he may have been

intimidated (51-52). But Mr. Aull was not uncertain. According to Seedman's affidavit, and also his book, Aull made a positive identification of plaintiff. He had good eyes - his job as a gunsmith, Seedman noted, involved precise close work (52) - and, without hesitation, he picked out Jaroslawicz as the man for whom he fitted the telescopic lens on the rifle (52). The fact that Aull made the identification, and later presented the evidence upon which a grand jury indictment against plaintiff was obtained, is nowhere challenged.

In his affidavit, Seedman states that "Aull's identification had to be accorded particular credence because, in adjusting the telescopic sight for the buyer only ten days prior, he had an excellent opportunity for a detailed observation of the individual" (16-17). Aull had also spoken to the purchaser, answering inquiries about ammunition (29).

Because of the federal crimes U.S. Treasury agents had previously been notified and were at the 19th precinct station that evening and morning (33).

After Aull's identification, City Detective Donald Brown set forth the identification in an affidavit in support of an application for a warrant to search the Jaroslawicz home, (29, 17). Judge Slotnick of the Manhattan Criminal Court found that evidence to constitute probable cause for such a search warrant (17, 30). It is not indicated

what, if anything, was found in the search.*

At this point, there being evidence of the federal crimes, Chief Seedman informed the U.S. Attorney for the Eastern District of New York, Robert Morse (now deceased) of that evidence. It was around midnight when Seedman telephoned Morse at home and left a message. Morse called back at 2:00 p.m., and Seedman gave him an account of what had occurred. Morse said that he would speak to the Attorney General and would call back, which he did at about 4:00 a.m. At that time he directed the federal agents at the stationhouse to arrest Jaroslawicz on the federal charge, (17, 53). As a convenience, Jaroslawicz was booked and fingerprinted at the 19th precinct "for other authorities." (17-18)

It is not denied by Jaroslawicz that the arrest was made by federal agents, who advised him of the charges and transported him to a federal facility (40-41). This is established also by federal records, indicating that plaintiff was arrested upon a complaint sworn to by Alfred A. Meyn, Special Investigator of the ATF Division of the U.S. Treasury Department (23, 25-27).

Plaintiff seeks to place responsibility for this federal arrest upon defendant, alleging that he "induced" it.

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* In his book, Seedman states that an address book belonging to Jaroslawicz contained an entry for Greenblatt's gunshop in Hempstead (54). But it is not stated just when and where that book was found.

That claim is made solely on the basis of a statement from Seedman's book, where Seedman wrote that the U.S. Treasury agents initially "balked at arresting Jaroslawicz, contending that the case against him was hardly overwhelming" and agreeing "They had a point" (52-53). Seedman wrote that he then phoned U.S. Attorney Morse "to see if he would order the [U.S. agents] to make the charge right away," which, after a lapse of a few hours, Morse did. Seedman, in his affidavit, responds to this allegation (18):

> "... the deponent was wholly without authority to direct or order the agents of the United States government to arrest Jaroslawicz, and did not attempt to issue such an order or direction. * * * As a federal offense had been committed and as the shooting incident was one of national significance, the deponent had been in contact with Mr.Morse and apprised him of the developments of the police investigation. Needless to say, the deponent could not order or direct the United States Attorney to cause Jaroslawicz's arrest."

C. Plaintiff in the custody of Federal agents, and the subsequent Grand Jury indictment

Jaroslawicz was brought before a U.S. Magistrate, Vincent A. Catalgio, that same day (October 22, 1971), and was again informed of the charge and of his right to counsel (23-28, 54-55). Bail was set at $25,000. That same day, Jaroslawicz posted a bond and was released (23).

On November 9, a two-count indictment was returned by a Grand Jury, charging Jaroslawicz with the same crimes for which he had been arrested by the federal authorities (21-22), which indictment, like the arrest, was bottomed upon the eyewitness testimony of Aull (19-20).

D. Events subsequent to indictment

In his brief, counsel summarizes the subsequent events only briefly, as follows (br., p.9):

> "Needless to say, plaintiff had not purchased the rifle in question, nor committed any other crime. The charges against the plaintiff, however, were not dismissed until February 1, 1972, after the actual purchaser of the rifle used in the shooting had been apprehended. At that time, all the charges against the plaintiff were dismissed."

The full story is recounted in Plaintiff's Exh. A (Seedman's book) and is nowhere denied (55-61). The fact is the charges were withdrawn by the U.S. Attorney upon evidence that was uncovered after the arrest, by police acting under the supervision of the defendant (55-61).*

*Contrary to the footnote on p. 18 of appellant's brief, the defendant, though being defended by the Corporation Counsel, is personally responsible for any judgment against him. A municipality cannot be liable for damages under 42 U.S.C. §1983. Monroe v. Pape, 365 U.S. 167 (1961). Nor is bound to idemnify defendant if he is held liable here.

Seedman's men were not finished after the federal arrest. For one,they had not as yet caught the sniper, and did not believe that Jaroslawicz had himself fired the rifle (55). Also, it appeared later, from Jaroslawicz's grandmother, that he had attended synagogue the whole of the day that the gun was purchased. It was a minor Jewish holiday, but Jaroslawicz, it was learned, was very observant (55). (It should be recalled that Jaroslawicz had offerred no alibi during the hours preceding his arrest by federal agents). Still, Seedman's doubts, which he expresses in a book written years after the event, were not based on any hard evidence but only on a "feeling about [Jaroslawicz] in my gut" (55).

Sometime afterwards, City detectives obtained hearsay information from an underworld informer that Jaroslawicz was not the person who had purchased the rifle (55-61), and detectives actively pursued this lead under Seedman's specific orders. It was not until sometime later that they obtained the name of the gun purchaser, first the forename "Gary", which was inconclusive, and then a full name, "Gary Shlian" (58-59). Gary Shlian, 17 years old, was also a member of the JDL. In fact, this Gary Shlian had been arrested earlier that year at a sit-in demonstration, together with plaintiff (58-59). Seedman, in his book, described Gary Shlian as "a big, dark bearlike guy like Jaroslawicz," and observes that "it was easy to see how the gunsmith [Aull] was confused" (59).

Seedman placed a "tail" on Shlian and police discovered, fortuitously, that he was planning to fly to Israel two days before he was due to be sentencted on another JDL-related crime (60). Shlian was arrested, aboard the airplane, for bail-jumping (60).

It was not until December 7 (after the Grand Jury indictment) that plaintiff finally gave a sample of his handwriting to the U.S. Attorney. It was found not to match the "Henry Faulkner" signature (59), whereas Shlian's handwriting did (60-61). Chief Seedman turned the evidence against Shlian over to the U.S. Attorney who, on February 1, 1972, announced that the charges against Jaroslawicz would be dropped and identical charges brought against Shlian (60); to which charges Shlian subsequently pleaded guilty (61).

ARGUMENT

THROUGHOUT, THE DEFENDANT ACTED UPON REASONABLE GROUNDS, AND THEREFORE VIOLATED NO CONSTITUTIONAL RIGHT OF PLAINTIFF. SUMMARY JUDGMENT IS PROPER SINCE THERE IS NO EVIDENCE TO DISPUTE (1) THAT PRIOR TO PLAINTIFF BEING BROUGHT TO THE POLICE STATION FOR QUESTIONING AND TO BE VIEWED BY WITNESSES, HE HAD BEEN IDENTIFIED FROM A PHOTOGRAPH AS THE PURCHASER, UNDER A FALSE NAME, OF A RIFLE USED IN THE COMMISSION OF A FELONY THEN BEING INVESTIGATED; (2) THAT THE FORMAL ARREST WAS MADE BY FEDERAL OFFICERS, ON A FEDERAL CHARGE, AND THEREFORE NECESSARILY WAS NOT THE RESPONSIBILITY OF DEFENDANT (A CITY OFFICIAL); AND (3) IN ANY EVENT THAT ARREST WAS BASED ON AN EYEWITNESS IDENTIFICATION AND THEREFORE WAS MADE WITH PROBABLE CAUSE.

A. Probable cause is a complete defense to plaintiff's claim of a false arrest, and reasonable suspicion is a complete defense to the claim that plaintiff's rights were violated by custodial interrogation prior to the formal arrest.

(1)

42 U.S.C. §1983 establishes a cause of action against one who, under color of State law, causes another to be deprived of a constitutional right, and establishes civil liability inter alia for a false arrest by a state officer.* The defenses to such a claim are the same as are available as in a common law action for false arrest: good faith and probable cause. Pierson v. Ray, 386 U.S. 547, 557 (1967); Street v. Surdyka, 492 F. 2d 368 (4th Cir., 1974); Rodriguez v. Jones, 473 F. 2d 599, 604 (5th Cir., 1973).

The definition of "probable cause" as announced by both the New York courts and the federal courts is based on "reasonableness" and common sense. "We have been told," this Court wrote in United States ex rel. Gonzales v. Follette, 397 F. 2d 332, 334 (2d Cir., 1968), "to use our common sense in resolving the issue of probable cause." See also, United States v. Ventresca, 380 U.S. 102, 109 (1965). To the same effect, see People v. Lombardi, 18 AD 2d 177, 180 (2d Dept., 1963) affd. 13 NY 2d 1014 (1963). See also, Wong Sun v. United States, 371 U.S. 471, 478 fn. 6 (1963); Draper

*42 U.S.C. §1983 - "Every person who, under color of any statute, ordinance, regulation, custom, or usuage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a action at law, suit in equity, or other proper proceeding for redress." (Laws of 1871, ch. 22, §1).

v. United States, 358 U.S. 307, 310 fn. 3 (1958).*

"In dealing with probable cause...as the very name implies, we deal with probabilities". Brinegar v. United States, 338 U.S. 160, 175 (1949); Adams v. Williams, 407 U.S. 143, 149 (1972). The arrestee need not be actually guilty and may very well be innocent. "The substance of all definitions of 'probable cuase' is a reasonable ground for the belief of guilt" Brinegar, supra. "Probable cause" in the constitutionl sense requires less evidence than to convict, and may be based even on evidence that would be incompetent at trial. United States v. Ventresca, 380 U.S. 102, 107-108 (1965). It may be based on evidence from an underworld informer, if considered reliable. It is an a fortiori case of "probable cause" where the evidence comes from an eyewitness of good character, and constitutes by itself sufficient competent evidence to indict and convict. Cf. United States ex rel. Catanzaro v. Mancusi, 404 F. 2d 296, 299 (2d Cir., 1968).

*In Sams v. N.Y. State Bd. of Parole, 352 F. Supp 296, 300 (S.D.N.Y., 1972), Judge Weinfeld applied a State statute in judging the validity of an arrest on a state charge, but noted the substantial identity with the federal standard (Id. at p. 300, fn. 21). The state statute would not apply to an arrest by federal officers on a federal charge. At best, the state law should apply, if at all, to the custodial interrogation by City police prior to the federal arrest. The better view, we submit, is that since 42 U.S.C. §1983 exists to vindicate only federal rights state statutes cannot be applied. See, Kerr v. U.S. Dist Ct. for N.D. Cal., 511 F. 2d 192, 197 (9th Cir., 1975).

"Good faith" is essential only where there is no "probable cause". A police officer who acted without "probable cause" may still avoid personal liability if he acted in good faith and with a "reasonable belief" in the validity of the arrest. Bivens v. Six Unknown Named Agents, 456 F. 2d 1339, 1347 (2d Cir., 1972), decision following remand, as applied to §1983 actions in Anderson v. De Cristofalo, 494 F. 2d 321 (2d Cir., 1974). See also, Rodriquez v. Jones, 473 F. 2d 599, 605 (5th Cir., 1973); Hill v. Rowland, 474 F. 2d 1374, 1377 (4th Cir., 1973). But if there was "probable cause" then we do not reach the issue of "good faith" since, if "probable cause existed then no civil rights protected by §1983 could be considered violated." Smith v. Swoope, 351 F. Supp. 259, 162 (W. D. Va., 1972); Street v. Surdyka, 492 F. 2d 368, 372-373 (4th Cir., 1974). Whether "probable cause" exists depends not on the arresting officer's belief but solely upon the objective facts. United States v. Tramontana, 460 F. 2d 464, 466-467 (2d Cir., 1972).

An appropriate citation on this point is Beauregard v. Wingard, 362 F. 2d 901 (9th Cir., 1966). There a jury, by a special verdict, found that defendant Wingard, a chief of police, had been motivated by malice and personnel bias against the plaintiff in initiating police action. But it is also found that the arresting officer had reasonable grounds to believe that a violation

had been committed, and had made a full and fair disclosure to the prosecuting attorney (id. at p. 903). The District Judge gave judgment to both defendants, which was affirmed on the basis of "probable cause". Said the Court of Appeals: "As for Wingard's involvement, it may simply be said that if an investigation succeeds in producing evidence of crime, probable cause for the arrest is not nullified by the fact that the otherwise successful investigation was maliciously inspired."

It is a well-established common law principle (and common law principles apply to §1983 claims) that improper motives cannot make a lawful arrest unlawful. Gladstone v. Galton, 145 F. 2d 742, 745 (9th Cir., 1944) ("We know of no offense in arresting a person accused of violating the law because the arrest is made con amore"); Holland v. Lutz, 194 Kan. 712, 402 P. 2d 1015, 1019 (Sup. Ct., Kansas, 1965); Marks v. Townsend, 97 N.Y. 590, 597 (1885); 35 C.J.S., False Imprisonment §7.*

*The cases cited by appellant for the proposition that bad faith can, by itself, support a claim under 42 U.S.C. §1983 - Robinson v. Daimond Housing Corp., 463 F. 2d 853, 867 (D.C. Cir., 1972) and Kinzler v. N.Y. Stack Exch., 62 F.R.D. 196, 202 (S.D.N.Y., 1974) (cited app. app. br., p. 18) are not even remotely similiar, since in those situations, the rightness or wrongness of the particular acts (not arrests) depended on subjective intent.

(3)

As for the custody prior to the formal arrest, there is a different standard. This is not to dispute plaintiff's claim that detaining a person in custody without a formal charge (custodial interrogation) is a restraint on liberty and therefore civilly actionable as a "false arrest" if made without justification. See the discussion in Jacques v. Sears, Roebuck & Co., 30 NY 2d 466, 473 (1972). But there is a significant difference between an arrest on a charge (sometimes called "formal" arrest or "full-fledged" arrest) and a temporary custodial interrogation; and that difference relates to justification. Custodial interrogation, for a limited time, in connection with an investigation, is justified even though police officers are "lacking sufficient cause to justify an arrest" (there meaning an arrest on a charge) People v. Morales, 22 NY 2d 55, 61, 64 (1968). In Morales, the U.S. Supreme Court granted certiorari, and remanded it on other grounds, noting that "we choose not to grapple with the question of the legality of cust dial questioning on less than probable cause for a "full-fledged arrest" Morales v. New York, 396 U.S. 102, 105-106 (1969). This leaves the decision of New York's highest court undisturbed; and remains the constitutional interpretation that governs New York police investigating state crimes, as defendant was, i.e., the felony of reckless endangerment. See, also People v. Anderson, 46 AD 2d 150, 152-153

(4th Dept., 1974); People v. Valerius, 36 AD 2d 671 (3d Dept., 1971). All that need be shown for a reasonable custodial interrogation is a "reasonable suspicion." People v. Kinne, 40 AD 2d 938 (4th Dept., 1972).

Morales specifically alludes to, and follows, decisions of of this court (22 NY 2d at p. 60), such as United States v. Middleton, 344 F. 2d 78 (2d Cir., 1965) and cases cited therein (at p.83):

> "Nor do we question the power of the police, under proper circumstances and while investigating a crime to detain suspects for reasonable periods of time in order to question them, check their stories, and run down leads which either confirm or contradict those stores. United States ex rel Corbo v. La Vallee, 270 F. 2d 513, 518 (2d Cir., 1959) cert. den. sub nom La Vallee v. Corbo, 361 U.S. 950 (2960). This long-recognized prerogative is vital not only to crime prevention and detection, but also 'protects those who are readily able to exculpate themselves from being arrested before their explanations are considered.' United States v. Vita, 294 F. 2d 524 (2d Cir., 1960) cert. den. 369 U.S. 823 (1962)] at p. 530. See also United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960)."

For a statement of the historical roots of such procedure, and for statutory and case law in many jurisdictions to the same effect, see United States v.

v. Vita, supra, 294 F. 2d at p. 530. *

(4)

If the §1983 claim fails, then all the other claims must fail.

A second claim against defendant is that, in violation of 42 U.S.C. §1985, he "conspired" with other persons "presently unknown to plaintiff" to deprive plaintiff of his rights under the equal protection clause "because he [plaintiff] was a member of the Jewish Defense League" (6-7). There is no allegation of any specific overt act other than by reference to the allegations to the §1983 claim (6). To prove a claim the plaintiff must show that those overt acts, done in furtherance of a conspiracy, resulted in an injury. Sykes v. State of Calif. (Dept. of Motor Vehicle), 497 F. 2d 197, 200 (9th Cir., 1974). But if there has been no actionable overt act (false arrest) then there has been no injury, and no denial of either due process or equal protection.*

*Even if this question of constitutional interpretation, which the Supreme Court acknowledged in Morales as one to "grapple with" (396 U.S. at pp. 105-106) and the N.Y. Court of Appeals as "perplexing" (22 NY 2d at p. 61), were now to be decided differently, that could not affect the defendant's civil liability since he is not require, on pain of personal liability, to predict the course of constitutional interpretation. Pierson v. Ray, 386 U.S. 547, 557 (1967); Bivins v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F. 2d 1339, 1348-1349 (2d Cir., 1972).

A third claim is that defendant "neglected and/or refused to prevent those wrongs [elsewhere alleged] from being committed against plaintiff" a claim pursuant to 42 U.S.C. §1986. A plaintiff who fails to establish a claim under §1985 also fails to prove a claim under §1986 since both sections involve precisely the same wrongs §1985 involves conspiracy to commit certain overt acts, while §1986 involves failure to prevent those same acts as are "mentioned in section 1985." See, Johnston v. National Broadcasting Co., Inc., 356 F. Supp. 904, 909-910 (E.D.N.Y., 1973); Post v. Payton, 323 F. Supp. 799, 802 (E.D.C.N.Y., 1971); Huey v. Barloga, 277 F. Supp. 864, 875 (N.D. Ill., 1967).

A fourth claim, in behalf of the father, and a fifth claim, for punitive damages, are purely derivative, and must also fail if the prime claim fails.

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*Also there must be discrimination, an intent to deprive of equal protection, and this requires a showing of "some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action" Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The Court in Griffin has left open whether intent "other than racial bias" would be actionable under this provision. It is thus not clear that members of the Jewish Defense League, any more than members of such ethnically oriented organizations as the Ku Klux Klan or the Black Panthers, are victims of "racial" of "class" bias.

B. The Standard Applied on a Motion for Summary Judgment

Summary judgment under F.R.C.P. Rule 56 is a useful procedural device for avoiding unnecessary trials, specifically, where there is no "genuine issue as to any material fact".

(1)

What is "material" in this context? The standard of materiality is analogous to that used on a motion for a directed verdict. Empire Electronics v. United States, 311 F. 2d 175, 180 (2d Cir., 1962); 10 WRIGHT & MILLER, Fed. Prac. & Proc., §2713, pp. 406-408. In both situations facts are not "material" unless establishing such fact is necessary "to the outcome" (Kiess v. Eason, 442 F. 2d 712, 713 [7th Cir., 1971]) or "would change the result". (McComb v. Southern Weighing and Inspection Bureau, 170 F. 2d 526 [4th Cir., 1948]). See also, Alco Kar Kurb Inc. v. Ager, 181 F. Supp. 97, 100 (D.N.J., 1960) affd. o.g. 286 F. 2d 931 (3d Cir., 1951). When a party is entitled to summary judgment (or a directed verdict) "on a single issue which is dispositive of the case, [then] the other issues become immaterial." DuVall v. Moore, 276 F. Supp. 674, 689 (N.D., Iowa, 1967).

Probable cause, we submit, is dispositive of the claim of false arrest, and reasonable suspicion for the claim of unlawful custody prior to the formal arrest. An alternate dispositive fact with respect to the formal arrest is that there is no evidence that defendant "induced"

it, since it was was necessarily the decision of federal officials acting within their exclusive jurisdiction. If we are correct, then all such other "issues" as whether or not appellant voluntarily accompanied the police to the station (we accept his version) or whether there was bad faith on defendant's part, or any discrepancies as to where plaintiff was found, or who or how many police took him into custody, etc., may be put aside as immaterial.

(2)

Having discussed what is meant by a "material fact", we turn to what is meant by a "genuine issue". Concededly, it is the burden of the moving party, in the first instance, to present evidence of such facts as would entitle him to judgment (or where presented at trial, to a directed verdict). Sartor v. Arkansas Gas Corp., 321 U.S. 620, 624 (1944). Where that is done, it then rests upon the opposing party to specify "some opposing evidence which it can adduce and which will change the result". Donnelly v. Guion, 467 F. 2d 290, 293 (2d Cir., 1972); Radio City Music Hall v. United States, 135 F. 2d 715, 718 (2d Cir., 1943); Sams v. N.Y. State Bd. of Parole, 352 F. Supp. 296, 300 (S.D.N.Y., 1972); Rinieri v. Scanlon, 254 F. Supp. 469, 473 (S.D.N.Y., 1966).

That burden, obviously, is not met by evidence relating to immaterial issues. And, as to the material issues, it is not met by allegations and conclusory statements. Beal v. Lindsay, 468 F. 2d 287, 291 (2d Cir., 1972); Donnelly v. Guion, 467 F. 2d 290, 293 (2d Cir., 1972). It is only

oppossing "evidence" that can establish the genuineness of a claimed issue of fact. Sams v. N.Y. State Bd. of Parole, supra.

All of the purported evidence of a claimed lack of probable cause in this case consists of inferences advanced from the text of the book "Chief". We agree that the party opposing summary judgment is entitled to the benefit of any reasonable inferences that a jury would be permitted to draw. But a jury, it is well to remember, is "permitted to draw only those inferences of which the evidence is reasonably susceptible and may not be permitted to resort to speculation". Ayers v. Pastime Amusement Co., 283 F. Supp. 773, 793 (D.S.C., 1968); 10 WRIGHT & MILLER, Fed. Prac. & Proc., §2727 p. 550. Applicable is the observation, quoted by Judge Cardozo from the English case of Jewell v. Parr 13 C.B. 916, that, "when we say there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established" (Matter of Case, 214 N.Y. 199, 204 [1915]).

C. A reasonable basis for custodial interrogation of the plaintiff is the undisputed fact that he had been identified from a photograph as the probable purchaser, under a false name, of the rifle used (shortly after the purchase) in the commission of a felony that police were investigating. Under all the circumstances, the duration of such custody was not unreasonable.

The reason why limited custodial interrogation is held not to violate the Constitution is that the right of the individual to move without restraint must be balanced against society's need to prevent crime and to bring criminals expeditiously to justice. (People v. Morales, supra, 22 NY 2d 55 at p. 61). Since restraint is to be balanced against the needs of police, there appears to be the requirement that the custodial interrogation be part of an investigation into a specific and serious crime, and not done at random. There must also be a reason (short of probable cause to make a formal charge) for detaining the specific individual or individuals (mass detentions are not permissible), and a reasonable suspicion is enough here. Such custodial interrogation is justified also because it can be for the benefit of the suspect, as a means by which he may avoid being formally charged. Finally, the procedure is permissable since such custody is allowed for a limited period only. All of these conditions and justifications for reasonable custodial interrogation are present here.

(1)

That police here were investigating a specific serious crime is undisputable. The shooting of four shots through a window into a room occupied by persons (children) was a dangerous felony. Plaintiff seeks to belittle the defendant's concern as motivated only to "placate" the Russians (Br., p. 25). Placating the Russians was, of course, not the responsibility of New York City detectives, but solving the case was. Diplomatic personnel and their families in this city are within the "public" whose protection is an obligation of New York City police, to whom Soviet officials made a justifiable complaint. "Placating" the Russians was however a proper concern of diplomatic officials anxious about our nation's relationship with a major foreign power (which this crime was, no doubt, intended to disrupt) and the fulfillment of the obligation of our government as host to the United Nations Organization.

(2)

That police had a reason for bringing in Jarsolawicz specifically is also undisputed. The rifle used in the crime had been purchased under a false name and upon the presentation of a false draft card, a fact established by U.S. Treasury agents (26-28). That this gun was purchased

illegally (the violation is punishable by imprisonment), and only 10 days before the shooting, made it reasonable to believe that the purchaser was aware of the felonious use to which this rifle was soon afterward put, and by whom.

Nowhere is it denied that prior to Jaroslawicz being brought in for questioning and for "live" identification, his photograph was one of two (the other being Lawrence Fine) selected by eyewitnesses to this illegal gun transaction from among many in an album. This is corroborated by the subsequent "live" identification of plaintiff, as established by the affidavits of the U.S. Treasury agent (28) and Detective Donald Brown of the 19th precinct (29). It would strain belief to suggest that the person identified by the gunsmith, and indicted, was just some person or JDL member picked up at random. Furthermore, Chief Seedman was not personally present when Jaroslawicz was picked up; and the only basis for assuming that he ordered Jaroslawicz and Fine to be brought in, rather than other JDL members whose photographs were also in police files, is information that had previously been obtained. There is no attempt to dispute that police had gone to the Jaroslawicz home before he was found in the area of the Soviet mission.

(3)

Another reason why custodial interrogation without formal arrest is not unreasonable, and therefore not unconstitutional, is that it benefits the suspect as well as the police. United States v. Middleton, 344 F. 2d 78, 83 (2d Cir., 1965); United States v. Vita, 294 F. 2d 524, 530 (2d Cir., 1961), both citing the discussion in United States Bonanno, 180 F. Supp. 71, 81-83 (S.D.N.Y., 1960).

This is no abstract proposition. Where a witness makes an identification or tentative identification from a group of photographs what could be fairer to an innocent person than a "lineup" where the witness is asked to pick out the criminal from among a "live" group. Stovall v. Denno, 388 U.S. 293, 302 (1967). The plaintiff complains, in general terms, that the "lineup" here was unfair, although he does not dispute there were 9 persons in it, including another JDL member (Lawrence Fine), and that his attorney, Mr. Zweibon participated in its formation.* But if plaintiff

*The vague claim as to "lineup", as made here, does not approach the situation described in Foster v. California, 394 U.S. 440 (1969), a 5-to-4 decision cited by appellant (br., p. 23). In judging whether a "lineup" procedure is unnecessarily suggestive, we must consider the totality of the circumstances. The prior use of photographs does not taint a line-up (United States v. Simmons, 390 U.S. 377 [1968]). Picking out the suspect from a series of photographs is surely a preferrable and in a sense is a "lineup" also. United States v. Harrison, 460 F. 2d 270 [2d Cir., 1972]). Furthermore, there is no obligation to allow counsel at a preindictment lineup (Kirby v. Illinois, 406 U.S. 682 [1972]). But counsel was allowed here, and he participated in the formation of the lineup. No affidavit of Mr. Zweibon is submitted to challenge this fact.

is correct that it was unconstitutional to take him into custody, then no "lineup" at all would have been possible prior to the bringing of a formal charge.

After a positive identification there still may be reason not to formally arrest and charge a person. The witness may be positive, but there will always be instances of close physical resemblance, and mistakes have been known to occur. The identified person may have an alibi or some other evidence of his innocence, which would cast doubt on the identification, or might even be conclusive as to innocence. "Far better", said the Court in Bonanno, supra, "for the accused to be given an opportunity [prior to being charged] to present his 'alibi' to the investigating police and wait while they established its sufficiency".

This plaintiff had such an opportunity. Later, it was discovered, from his grandmother, that he had been in a synagogue all day on the day that the rifle was purchased. But he had declined to so state. Also, his handwriting, it was later found, did not match the "Henry Faulkner" signature on the gun application. But he had refused a request for a handwriting sample that morning, and continued to refuse until a month after his indictment. True, it was his right to remain silent. But his does not alter the fact that pre-arrest custody gave him the opportunity to perhaps avoid

being charged, and for this additional reason it was not an unreasonable procedure, and hence not an unconstitutional one.

(4)

Another reason why such procedure is not unconstitutional is that the restraint is only for a reasonably short period. As this court noted in United States v. Vita, 294 F. 2d 524, 531 (1961), cert. den.. 369 U.S. 823 (1962), that such detention must be completed within a reasonably short time, the "circumstances" in any particular case may justify a longer detention if it was conducted with dispatch, was essential, and did not involve "third degree" methods to extract a confession.

It is true that the duration between the plaintiff being brought in and his formal arrest was 10 hours, but, under all the circumstances, the police procedures were accomplished with reasonable, indeed, utmost, dispatch.

First, the police did not select the time that this custody started. It was dictated by the fact that plaintiff was not found until about 6:00 p.m. Then there was a period until Lawrence Fine arrived at the precinct. Nevertheless, the witnesses were summoned immediately, despite their inconvenience, rather than the next morning.

Second, after the identification by Aull, the situation had changed: now there was "probable cause" for the federal agents to make a formal arrest and charge. During this time,

an application for a search warrant was expeditiously prepared and then presented to a judge. A warrant was obtained during the night and executed promptly.

Third, undisputedly, the evidence was communicated to U.S. Attorney Morse, without delay, even though it was midnight. Morse was not home, and did not receive the message until about 2:00 a.m. There is no indication that he could have been reached sooner. It was Morse who withheld making a decision until 4:00 a.m.

Fourth, it is also undisputed that plaintiff was arraigned before a U.S. Magistrate and released on bail at the earliest opportunity. If the federal arrest had been made earlier, say at 9:00 p.m., then the federal custody (until bail was posted) would have been longer, but the total custody would have been the same.

This custodial interrogation, which was reasonable when begun, was not rendered unconstitutional by the duration of such custody.

D. The allegation that defendant, a City police official, "induced" federal officials to arrest plaintiff on a federal charge is legally insufficient where there is no claim that defendant made any untruthful statements to federal officials, and where the decison to arrest and prosecute was necessarily a decision of federal officials acting in the exercise of their exclusive jurisdiction.

The only purported "evidence" offered to support the conclusory allegation that defendant "induced" federal officials to arrest and charge plaintiff with a federal crime, apart from turning over the evidence, is based on an interpretation of the following passage from the book "Chief" (52-53):

> "But the ATF [federal agents] balked at arresting Jaroslawicz contending that the case against him was hardly overwhelming. They had a point. Under normal circumstances I never would have ordered Jaroslawicz arrested so quickly. But with everyone so anxious to see fast results, the gunsmith's identification would have to suffice. In the morning George Bush [the U.S. Ambassador to the U.N.] could stand up at the UN and mollify the Russians by announcing that an arrest had already been made.
>
> At midnight I tried to call [U.S. Attorney] Bob Morse to see if he would order the AFT to make the Federal charge right away.*** After listening to the facts of the case, he checked with the Attorney General and then called back to order Jaroslawicz locked up for violation of the Federal Gun Law". (emphasis ours)

Nothing in the above supports any inference that

Seedman did any more than call Morse to see "if" Morse would order an arrest after "listening to the facts of the case".* This was a decision which the U.S. Attorney (or the Attorney General), once apprised of the evidence, was fully capable of making on the basis of his legal knowledge. Nor is there reason to believe that such advice, if given, was in anyway decisive. Only Morse, who is now deceased, would be in any position to so state. Thus, there is no showing of proximate cause. But in any event, nothing that the Chief of Detectives could say can alter the fact that by reason of their respective jurisdictions, the responsibility for the decision to arrest on a federal charge was necessarily and exclusively that of the U.S. Attorney (or his superiors).**

*Treasury agents were present at the station, although it is not indicated whether Morse spoke also to them, as well he migh..

**The federal agents who ordered and made the arrest, in the exercise of thei- discretion, could not be liable under §1983. See, Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). Also, the U.S. Attorney, with respect to his discretionary decision to prosecution, would be protected by prosecutorial immunity, as also would those officers following his orders. Fanale v. Sheehy, 385 F. 2d 866 (2d Cir., 1967); Boyd v. Adams, 513 F. 2d 83, 85-86 (7th Cir., 1975). Also, it is difficult to see how a federal arrest could be "under color of State law" (42 U.S.C. §1983). That civil liability could be imposed on the basis of "state action" by one who allegedly advised these federal officials would seem, we submit, incongruous.

E. Assuming that defendant could be liable for the federal arrest if he "induced" such decision, that arrest is shown by undisputed evidence to have been made with "probable cause," and hence did not violate plaintiff's constitutional rights.

The crucial fact that plaintiff was identified by Kenneth Aull as the purchaser of the rifle (in violation of federal law) is established here not only by defendant's affidavit but also by Detective Donald Brown (29), and also by Special Investigator Alfred Meyn of the U.S. Treasury Department (28). Most significantly, it is nowhere denied.

Since "probable cause" requires only a probability of guilt, not actual guilt (Brinegar v. United States, 338 U.S. 160, 175 [1949]), an eyewitness identification would seem to meet that test easily, especially where, as here, there is nothing in Mr. Aull's character or background known to police that would make him unreliable, and he had both a good opportunity to see the purchaser and good vision. Cf. United States ex rel. Cardaio v. Casscles, 446 F. 2d 632, 637 (2d Cir., 1971). Indeed, while "probable cause" does not require such evidence as would be necessary to convict, Adams v. Williams, 407 U.S. 143, 149 [1972]; United States v. Chaplin, 427 F. 2d 14, 15 [2d Cir., 1972] cert. den. 400 U.S. 830 [1971]), here the evidence of Aull, if believed by a jury, would have been sufficient even for that.

As a matter of law, an eyewitness identification by a reliable witness, in the absence of strong exculpatory evidence, constitutes the necessary "reasonable ground for

the belief of guilt," and therefore "probable cause" for an arrest. Brinegar v. United States, 338 U.S. 160, 175 (1949); United States ex rel. Catanzaro v. Mancusi, 404 F. 2d 296, 299 (2d Cir., 1968). It is sufficient, in a civil action for damages, to warrant a decision on the law in favor of the arresting officer, and, on undisputed evidence, for summary judgment. Barnes v. Dorsey, 480 F. 2d 1057, 1061 (8th Cir., 1973) affg. 354 F. Supp. 179, 183 (E.D. Mo., 1971); Bartlett v. Wheeler, 360 F. Supp. 1051, 1054 (W.D. Va., 1973). See also, Langley v. City of New York, 40 AD 2d 844 (2d Dept., 1972); Stearns v. N.Y.C.T.A., 24 Misc 2d 216, 219 (Sup. Ct., N.Y. Co., 1960), affd. 12 AD 2d 451 (1st Dept., 1960).

The "evidence" offered by plaintiff to show the alleged lack of probable cause (and that defendant was aware of plaintiff's innocence) are interpretations of passages from the book "Chief." One such passage, stressed by plaintiff, is (51):

> "Though initially he [Jaroslawicz] made a few stabs at denying any part in the shooting, he did not seem at all upset at having been arrested. If anything, Seedman felt, Jaroslawicz acted as if he had been annointed. Yet the boy clearly was not stupid. How could he behave this way, knowing he was likely to be jailed for attempted murder? He had to know something that so far the detectives didn't. The whole business made Seedman uneasy."

This passage describes Seedman's feeling at a time before the "live" identification by Aull (51-52); and, at best, it suggests some doubts in his mind as to whether Jaroslawicz was guilty of "attempted murder." In no way does it suggest any belief in Jaroslawicz' innocence of purchasing the gun in violation of federal law. On the contrary, the feeling that Jaroslawicz "had to know something" would indicate that police believed him to be involved even more deeply. Nothing here suggests a reason for Seedman to withhold from the U.S. Attorney the evidence that was later to be obtained from Aull.

Plaintiff then goes on to place primary emphasis on the following passage (52-53):

> "But the ATF balked at arresting Jaroslawicz, contending that the case against him was hardly overwhelming. They had a point. Under normal circumstances I never would have ordered Jaroslawicz arrested so quickly. But with everyone so anxious to see fast results, the gunsmith's identification would have to suffice. In the morning [U.N. Ambassador] George Bush could stand up in the UN and mollify the Russians by announcing that an arrest had already been made."

Nowhere in that passage (or elsewhere) does Seedman indicate that he believed there was no "probable cause" for a federal arrest. On the contrary, his statement that "the gunsmith's identification would have to suffice" indicates a belief that there was sufficient legal evidence to justify an arrest, although that decision would have to be made by

others. At most, Seedman states that he agreed that the evidence against Jaroslawicz was "hardly overwhelming." But "overwhelming evidence" is not the constitutional (or statutory) standard for an arrest.

Furthermore, the underlined passage is taken out of context. It should be read together with other statements by Seedman in the same pages; to wit, that Seedman's "gut feeling" was based on his impression that Jaroslawicz "had the wrong look and the wrong face for a sniper" (55), which does not relate to the gun charge. Seedman notes that Aull had picked out Jaroslawicz "without hesitation" (53); that "the case looked even better when, in an address book belonging to Jaroslawicz, we found an entry for Greenblatt's gun shop" (54); and that "as suspects go, Jaroslawicz looked good" (55). All this hardly indicates that Seedman believed subjectively, much less that he had evidence, that Aull's identification was wrong and that Jaroslawicz was innocent of the gun charge for which he was arrested and indicted by federal authorities. All that Seedman states is that he would not have made the arrest "so quickly". If anthing, this is consistent with his statement that he did not urge the arrest but merely presented the U.S. Attorney with "the facts of the case" (53).*

*This is not to suggest that we consider it improper for the federal officials to be influenced in the timing of the arrest by the need for calming justified diplomatic protests, just as long as there was sufficient evidence to arrest and charge a person.

Plaintiff underlines also the following passage from "Chief" (53):

> "All the time, Burt Zweibon, lawyer for the JDL, was hollering that his client was being railroaded to placate the Russians. I have heard lawyers yell louder for less reason. But with the President planning to visit Russia later in the year, I was not about to allow a dopey teen-ager from Brooklyn to cast a shadow on that event."

Here also, nothing indicates that the arrest was made without probable cause. Nothing suggests just what Mr. Zweibon was hollering about (his affidavit is not submitted), or that Seedman believed that Zweibon had any valid or legitimate reason to do so. In context, it seems rather that Zweibon's complaint was against the decisions to arrest, as made by federal officials. And the passage - that he (Seedman) was not going to let this "dopey teenager" affect the foreign policy of the nation - shows once again that Seedman did not believe, much less know, the plaintiff to be innocent of the gun charge.

Finally, plaintiff emphasizes that portion of the book describing defendant's thoughts <u>after</u> detectives had obtained hearsay information from an underworld informant. The passage stressed is (58):

> "Seedman felt they [detectives] would have to move as cautiously with this name ["Gary"] as they had moved quickly with Jaroslawicz. They could not afford to release one suspect and arrest another unless the evidence was absolutely solid."

There is some literary license here since, undisputedly, Jaroslawicz was already "released" (on bail). And, quite obviously, City detectives had no authority to arrest, or charge, or release anyone on the federal gun charge. It is not clear whether plaintiff's stress on the above passage is to indicate the speed of the City police when he was arrested or to complain of the lack of it afterwards. We have referred to police actions prior to the arrests: now we respond to a claim that that charge was not withdrawn as soon as it could be.

The above quoted sentence follows a description of the informant as somewhat less than absolutely reliable, and his information as hearsay and incomplete. The sentence preceding the quote indicates that the informer said "I think maybe a guy named Gary did it. That's all I heard." The police volunteered the name "Gary Fishman," to which the informer, Angelo, answered "I don't know, maybe". To have arrested "Gary Fishman" would have been wrong since there was no evidence against him, and in fact he was innocent. Police followed Fishman for days but learned nothing (59). What could they have told the U.S. Attorney? Nor should it be assumed that the federal agents, who had sole control, would have withdrawn the indictment on such "information" (59). It would have made them "look bad if a new culprit popped up-especially one supplied by us" (59).

Seedman's men vigorously pursued the now reluctant informant. Finally, he became a bit more definite: "Maybe try a guy named Gary Shlian" (59). That information "didn't thrill the AFT" (59). But City police continued to keep Shlian under surveillance and arrested him on a bail-jumping charge just as he was leaving the country. It was the U.S. Attorney who made (and alone could make) the decision to drop the charges against plaintiff, and he did so only after he could bring identical charges against Shlian, a fellow JDL member.

It ill suits plaintiff to complain of the pace of City police in following up the lead (which they alone developed) while he himself was declining to give the alibi (which he had) or provide a handwriting sample. Indeed, from all indications, he did not really wish the police to "break" this case at all.

CONCLUSION

THE JUDGMENT SHOULD BE AFFIRMED, WITH COSTS.

October 8, 1975

Respectfully submitted,

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